IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Kevin A. ROSENBERG
Disbursing Clerk Second Class (E-5), U.S. Navy

NMCCA 200100797 Decided 8 April 2004

Sentence adjudged 4 October 2000. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Fleet Air Mediterranean, Naples, Italy.

LT MICHAEL J. NAVARRE, JAGC, USNR, Appellate Defense Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel

SUSZAN, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, in accordance with his pleas, of two specifications of wrongful appropriation and two specifications of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for 90 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant has raised two assignments of error. First, he alleges the military judge abused his discretion in excluding evidence of illegal pretrial punishment during sentencing. Second, he contends that his sentence to a bad-conduct discharge and 90 days confinement is inappropriately severe in light of the fact that he paid back almost the entire sum of money involved in his offenses. While not assigned as error, we note the convening authority failed to abide by the terms of the pretrial agreement when he approved the sentence as adjudged and ordered the confinement executed, without suspending confinement in excess of two months.

We have thoroughly examined the record of trial, the appellant's assignments of error, and the Government's response. Following that examination, we conclude that the findings are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed with respect to the findings. Arts. 59(a) and 66(c), UCMJ. We also conclude that the military judge's exclusion of evidence of illegal pretrial punishment was prejudicial error warranting sentencing relief. Accordingly, we reassess the sentence in our decretal paragraph. As reassessed, we conclude that the sentence is not inappropriately severe and that the relief granted corrects any possible error in the convening authority's action.

Statement of Facts

The appellant was tried at U.S. Naval Support Activity, Souda Bay, Crete, Greece. He plead guilty in accordance with a pretrial agreement. During the sentencing phase the trial counsel called Commander (CDR) Cynthia J. Talbert, U.S. Navy, as a Government witness in aggravation.

On cross-examination, the trial defense counsel questioned CDR Talbert, the appellant's former executive officer, about her knowledge and opinion concerning the duties assigned the appellant while he was temporarily assigned to another command awaiting trial. Trial counsel objected on general grounds of relevance. Trial defense counsel offered that "degradations that Petty Officer Rosenberg has sustained in the last several months are relevant . . ." Record at 68. Trial counsel conceded the point but refined his objection to that of the witness' opinion being irrelevant and the military judge sustained the objection. *Id.* at 68. Trial defense counsel attempted to continue this line of questioning without calling for an opinion from the witness. Trial counsel objected on general grounds of relevance and the military judge sustained the objection without allowing argument from trial defense counsel. *Id.*

Trial defense counsel made another attempt during cross-examination of the witness to introduce evidence of pretrial punishment and the following exchange ensued:

> Q. Do you recall saying that you were inclined not to grant DK2 Rosenberg's leave request because it would "send the wrong message"?
> A. If I said it then I said it. I do not recall exactly verbatim what I said but I trust you to tell me what I said if you made notes.
>
> MJ: Counsel, what is the relevance of all of this?
> DC: Again, sir, it is simply to show prior punishment and deprivations of DK2 Rosenberg.

MJ: Counsel, you should have brought a motion up on this. What does it have to do with now in this part of the trial?
DC: I believe it is still relevant on sentencing, sir.

MJ: What part—Tell me under R.C.M. 1001, where it is relevant?

. . . .

DC: Sir, under R.C.M. 1001(c)(1)(B), matters in mitigation, includes any evidence introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for recommendation of clemency. . . . Again, Your Honor, I would consider prior deprivations----

MJ: I don't----

DC: Understood, sir.

MJ: It says specifically Article 15, not some kind of exposition on what you think other punishments are. It says nothing of that regard.

DC: Understood, sir.

MJ: I am not going to let you go through this anymore.

Id. at 69-70.

The appellant later presented evidence of prior punishment through his unsworn statement. *Id.* at 111.

Sentencing Evidence

The standard of review for a trial judge's ruling regarding admissibility of evidence in sentencing is whether the military "judge clearly abused his discretion." *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999)(quoting *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995); *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A. 1993)). An abuse of discretion occurs where a judge's decision is based on erroneous legal principles. *United States v. Luster*, 55 M.J. 67, 71 (C.A.A.F. 2001)(citing *United States v. Travers*, 25 M.J. 61, 63 (C.M.A. 1987)). We conclude that the military judge abused his discretion here.

RULE FOR COURTS-MARTIAL 1001(c)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) sets forth the rule as to what evidence the defense can present in mitigation during the sentencing phase of trial, and provides that "[m]atter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency." Evidence qualifying for admission under R.C.M. 1001(c)(1)(B) must also pass the test of relevancy under Military

Rule of Evidence 401, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

Evidence of prior punishment that would entitle an accused to sentence relief clearly falls with the definition of "matter in mitigation" under R.C.M. 1001(c)(1)(B). Punishment before trial is prohibited under Article 13, UCMJ which provides: "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence . . . ." If an accused, or appellant, can demonstrate that a violation of Article 13, UCMJ, exists, he is entitled to sentence relief. *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003).[1] In fact, failure to raise the issue of pretrial punishment at the court-martial, absent some properly disclosed sentence consideration, has been seen to come perilously close to inadequate representation by counsel. *United States v. Cruz,* 25 M.J. 326, 330 (C.M.A. 1987).

In the case at hand, trial defense counsel attempted to introduce evidence of prior punishment during cross-examination of the Government's witness and was stopped by the military judge on three occasions, the third time on the military judge's own initiative. Record at 67-70. The military judge failed to find the evidence to be even minimally relevant, operating under the mistaken belief that the evidence could only be introduced through a separate motion for sentence credit. *Id*. at 69. There is no requirement that the appellant raise the issue of pretrial punishment exclusively through a motion for sentence credit. This court has found "placing the pretrial treatment into the sentencing crucible . . . vice pursuing a nominal arithmetic credit" to be an acceptable trial tactic. *United States v. Foster*, 35 M.J. 700, 704 (N.M.C.M.R. 1992). The appellant is free to make the tactical decision to use the complained of conditions as a means of obtaining a lesser-adjudged sentence.[2] *See Inong*, 58 M.J. at 463.

While evidence of prior punishment was presented through the appellant's unsworn statement, it is doubtful the military judge afforded it much weight in view of his evidentiary rulings on the issue. We are not convinced that the erroneous restriction on the appellant's right to present evidence of prior punishment in mitigation and the military judge's conclusion that such evidence was irrelevant for sentencing was harmless error. Therefore, we find the military judge's abuse of discretion amounted to error

[1] We need not determine whether the appellant was actually subjected to improper pretrial punishment because we will grant relief for the military judge's refusal to permit the trial defense counsel to attempt to demonstrate improper punishment.

[2] Exercising this tactical decision now results in waiver of the Article 13, UCMJ, sentence credit issue on appeal. *Inong*, 58 M.J. at 463.

materially prejudicial to the substantial rights of the appellant requiring the sentence be reassessed. Art. 59(a), UCMJ.

Conclusion

Accordingly, the findings are affirmed. We reassess the sentence and approve only so much of the sentence as includes a bad-conduct discharge and reduction to pay grade E-1. *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998).

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court